SUPREME COURT U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-511

JAMES TRAINOR, Acting Director, Illinois Department of Public Aid,

Petitioner,

vs.

ELVIRA VARGAS, individually and on behalf of all others similarly situated,

Respondent.

EMERGENCY PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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JAMES TRAINOR, Acting Director, Illinois Department of Public Aid,

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vs.

ELVIRA VARGAS, individually and on behalf of all others similarly situated,

Respondent.

EMERGENCY PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Acting Director of the Illinois Department of Public Aid, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 22, 1974.

OPINIONS BELOW

The opinion of the United States District Court, Northern District of Illinois, Eastern Division and the opinion of the United States Court of Appeals for the Seventh Circuit are not reported, and hence appear in the appendix hereto. The order of this Court staying the injunction also appears in the appendix.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on October 22, 1974. This emergency petition for certiorari was filed within 90 days of the date of the entry of that order. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I. Whether an injunction requiring retroactive payments of state funds for the period of October 1, 1974 to October 22, 1974 is contrary to the Eleventh Amendment?

II. Whether the United States Court of Appeals abused its discretion in granting an injunction which was denied by the United States District Court after a hearing, and which required Petitioners, in part, to make retroactive payments and further to revamp its records and expend State funds without any opportunity for recoupment of those funds should Petitioners succeed in this appeal where the Court of Appeals had no hearing on the merits of the case?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Eleventh Amendment to the United States Constitution.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of another foreign State."

Chapter 42, U.S.C. § 1983.

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

Chapter 28, U.S.C. § 1343.

Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637.

Chapter 28, U.S.C. § 2201.

Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 63 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349.

Chapter 28, U.S.C. § 2202.

Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after

reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c 646, 62 Stat. 964.

Chapter 28, U.S.C. § 1254.

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

Chapter 28, U.S.C. § 1292.

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; . . .

Chapter 28, U.S.C. § 1331.

Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000., exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub. L. 85-554, § 1, 72 Stat. 415.

STATEMENT OF THE CASE

In January, 1974, a new Title XVI of the Social Security Act took effect and initiated the SSI (Supplemental Security Income) program which created a uniform federal minimum assistance grant. This grant is 100% federally funded, and is administered by the Social Security Administration of the Department of Health, Education and Welfare. Individual states which, prior to the inception of this program on January 1, 1974, were giving assistance above the proposed SSI amount were required to supplement the basic SSI grant after that date to maintain the prior amount at the least. The mandatory supplement is 100% funded by the State of Illinois.

A state, in administering SSI grants, has a choice of administering the supplement and issuing the checks it-

self, or of allowing the Social Security Administration to administer the supplement. At the inception of the program, the Illinois Department of Public Aid elected to have the Social Security Administration administer the State's portion of the program. However, Illinois reserved the responsibility to investigate and review the needs and living arrangements of these recipients and to supply this information to the Social Security Administration so that it could adjust the State's portion by diminishing or increasing the grants accordingly. The Social Security Administration in administering the program, substantially failed to act on the information provided by the Petitioner. Thus, in September of 1974, the Illinois Department of Public Aid exercised its option of electing to administer its own portion of the program, i.e., the mandatory supplement. From the computation of the changes which took place in the recipients' needs or living arrangements from January 1, 1974 to September, 1974 (the period under the Social Security Administration) it was found that many grants were improper, approximately 3,780 of which were improperly high. It was thus necessary in October of 1974 to reduce or terminate the State's mandatory supplement in those cases, which the Social Security Administration had failed to do. The basic federal grant was not affected.

On September 20, 1974, after its election to self-administer the program, the Department mailed advance notices (see Appendix) to certain recipients of the State Supplemental portion of the program informing these recipients that their October grant would be reduced because of changes in their needs or living arrangements which occurred between January 1, 1974, and September, 1974. The notice also stated that the reduction would not take

place if the recipient could show that the information was incorrect. "You may meet with a representative from your local office to question this action. This meeting would be informal and you may present information or evidence. You may be represented by a person(s) of your choice . . ." It was further stated that whether or not the recipient wished such a meeting, he would "still have the right to appeal the intended action" and the simple procedure for an appeal was given.

On October 2, 1974, Respondents filed an action in the United States District Court for the Northern District of Illinois, Eastern Division, requesting declaratory judgment and injunctive relief pursuant to 42 U.S.C. § 1983, jurisdiction being conferred on that court by 28 U.S.C. § 1343(3) and (4); 28 U.S.C. § 1331; and 28 U.S.C. § 2201 and 2202. The Complaint alleged that the advance notice notice sent out by the Department was constitutionally inadequate. On October 4, 1974, after receiving Respondent's brief and hearing the arguments of counsel, the District Court denied Respondents' motion for temporary restraining order and preliminary injunction. The Court also denied the motion for injunction pending appeal. The Court further determined that the action for declaratory judgment and injunction sought by Respondents "must be denied for the reason that the notice for recipients in issue constitutes adequate notice and opportunity to be heard." (See Appendix).

Having reviewed and corrected all of the records of the recipients involved herein, the Department mailed all the corrected October assistance checks to Respondents in the amounts indicated in the advance notice by October 7, 1974.

On October 8, 1974, the Respondents filed a Motion for Injunction Pending Appeal in the United States Court of Appeals for the Seventh Circuit. On October 22, 1974, the United States Court of Appeals granted the Motion for Injunction Pending Appeal and enjoined Petitioner from "reducing, terminating, or suspending public assistance grants of Plaintiff [Respondent] and the Plaintiff class action based on the form notice of such reduction, termination or suspension pending appeal." The Court further ordered an expedited schedule for briefs and oral arguments. (See Appendix). The reductions to which the injunction refers amount to greater than $100,000 per month of Illinois funds.

On October 26, 1974, Petitioner filed an "Emergency Motion for Stay Pending Determination of Application for Writ of Certiorari" in this Court which was granted on the same date. (See Appendix). This emergency petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I.

AN INJUNCTION REQUIRING THE RETROACTIVE PAYMENT OF STATE FUNDS FOR THE PERIOD OF OCTOBER 1, 1974 TO OCTOBER 22, 1974, CONTRAVENES THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The October 22, 1974, order of the Court of Appeals for the Seventh Circuit granting an injunction, requires the Petitioner, in part, to pay funds to Respondents which were deducted from the Respondents' October Supplementary State checks pursuant to Petitioner's records. Respondents' application for a temporary injunction in the Seventh Circuit was made on October 8, 1974, subsequent to the mailing of the Respondents' October checks. The Eleventh Amendment to the United States Constitution, as discussed in *Edelman* v. *Jordan*, —— U.S. ——, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) prohibits such retroactive payments. This Court in reversing the award of retroactive payments ordered by the Seventh Circuit in *Jordan* stated:

> "It [the retroactive award] requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation to those whose [October checks were paid] at a time when petitioners were under no court-imposed obligation to conform to a different standard . . . We reach a similar conclusion [that this suit is barred by the Eleventh Amendment] with respect to the retroactive portion of the relief awarded . . . in this case." 39 L. Ed. 2d at 675-676.

The injunction of October 22, 1974, clearly falls within the prohibited acts cited in *Jordan*. The funds to satisfy the requirements of the injunction in this case for the month of October must inevitably come from the general revenues of the State of Illinois. Such an award resembles far more closely the monetary reward against the State prohibited in *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 857 (1945) than it does the prospective injunctive relief awarded in *Ex parte Young*, 209 U.S. 123 (1908). As this Court stated in the *Jordan* case, quoting from Judge McGowan's opinion in *Rothstein* v. *Wyman*, 467 F. 2d 226 (CA 2, 1972), cert. denied 411 U.S. 921, 36 L. Ed. 2d 315, 93 S. Ct. 1552 (1973):

> "It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force." Id., at 236-237 (footnotes omitted).

The portion of the injunction requiring the retroactive payment of additional monies based on the October checks of the Respondents clearly contravenes the Eleventh Amendment as interpreted in the Jordan decision, and interprets a federal question in a manner conflicting with decisions of this Court, pursuant to Supreme Court Rule 19 so as to invoke the powers of this Court to grant this petition for certiorari.

II.

THE UNITED STATES COURT OF APPEALS ABUSED ITS DISCRETION IN GRANTING THE INJUNCTION.

As previously indicated, Respondents filed this action in the District Court on October 2, 1974, requesting declaratory judgment and injunctive relief alleging that the advance notice sent out by the Department was constitutionally inadequate. On October 4, 1974, a hearing was held on the merits of this case. Briefs were submitted to the Court by Respondents, Petitioner having but one day's notice. At the close of arguments, the Court denied Respondents' motions for temporary relief. The Court further stated that based on the arguments of counsel, the action for declaratory judgment and injunction "must be denied for the reason that the notice for recipients in issue constitutes adequate notice and opportunity to be heard." The Court was there referring to the argument raised by Respondents that the notice in this case did not comply with the notice requirements of *Goldberg* v. *Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). Petitioners advanced the argument that there were three bases for properly distinguishing this notice from the defective notice in *Goldberg:* (1) The notice indicates the reason for the reduction; (2) the notice gives recipients a simple means of staying the reduction until after an informal meeting with a Department employee to discuss in greater detail the propriety of the proposed reduction and (3) a means to appeal regardless of whether a hearing was had. Based on Respondents' brief and arguments of counsel the trial court found the notice herein to be in compliance with the *Goldberg* requirements.

On October 8, 1974, Respondents filed a Motion for Injunction Pending Appeal in the United States Court of Appeals, Seventh Circuit. The cases are legion which stand for the proposition that the only question on appeal is whether the district court abused its discretion in denying the preliminary injunction. *Gaines Dry Cleaners* v. *City of Chicago,* 123 F. 2d 104, 105 (7th Cir. 1941). In order to determine whether there has been an abuse of discretion, it would be necessary for the Court of Appeals to examine the facts of the case and to make a decision on the merits in the course of a full Appellate hearing. However, based solely on Respondents' Motion, the Court of Appeals granted the requested injunction without the benefit of a full briefing on the merits of the case. When presented with an appeal from a lower court order denying a request for injunctive relief, an Appellate Court may grant an interlocutory stay pending appeal only if the lower court had grossly abused its discretion. *Maas* v. *U.S.*, 371 F. 2d 348 (D.C. 1966), *Kontes Glass Co.* v. *Lab Glass, Inc.*, 373 F. 2d 319 (3rd Cir. 1967). The Court of Appeals improperly entered an injunction pending appeal contrary to the decision of the District Court, without any finding of an abuse of discretion, gross or otherwise, by the District Court and without a full briefing on the merits of the case. Indeed, the Seventh Circuit was silent as to its reason for granting the Motion in Respondents' favor. The only hearing had in this case based on the merits found in favor of the Petitioner. The action of the United States Court of Appeals for the Seventh Circuit in this case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision pursuant to Supreme Court Rule 19.

Furthermore, the questionable ruling is, in effect, a final judgment as to a portion of the case, and from which there is no opportunity for the injured party, Petitioner, to seek review, except before this Court. By the action of the Court of Appeals, recipients have secured, at least temporarily, higher welfare benefits than Petitioner's records indicate they are entitled to until the final determination of this cause by the United States Court of Appeals. Because Respondents are welfare recipients there is no practicable way these monies can be recovered by the State should the trial court's decision below be affirmed.

In order to comply with the order of the Seventh Circuit, and to avoid charges of contempt, Petitioners would be required to completely change the new system enacted and return its computers to the former incorrect numerical figures. Any monies paid out pursuant to the order of the Seventh Circuit over and above the amounts shown on the Department's records to be legitimate will be irretrievably lost to an already financially overburdened system. This ultimately would have the effect of reducing the amount of funds available for disbursement to all welfare recipients.

Hence, the mandatory interlocutory injunction of the Seventh Circuit does not protect or secure Petitioner's rights pending appeal in that Court or this Court. Conversely, if Respondents should succeed in the Appellate Court after a hearing on the merits, the Department maintains records of each recipient's checks and will return any monies withheld and maintain their assistance at the higher level. The Petitioner clearly faces permanent and irrevocable injury, whereas the Respondents do

not. Any injunction that might lie should not lie at this point in the proceedings but after the Seventh Circuit can arrive at a decision based on the merits of this case. The irreparable monetary damage to the State, which would ensue by compliance with the injunction if Petitioners are successful on the appeal underscores the necessity of this Court's power of supervision. The Seventh Circuit clearly and wrongly abused its power of discretion by granting this injunction.

CONCLUSION

For the reasons stated herein, it is respectfully requested that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Of Counsel.

APPENDIX

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Frank J. McGarr

Cause No. 74 C 2849 Date: October 4, 1974

Title of Cause: Elvira Vargas v. James Trainor

Brief Statement of Motion: Motion for Temporary Restraining Order and Preliminary Injunction.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel:

James D. Weill—Legal Assistance Foundation
64 East Jackson Boulevard—Chicago, Illinois 60604

Representing:

Plaintiff.

Names and Addresses of other counsel entitled to notice and names of parties they represent:

William J. Scott, Attorney General
160 North LaSalle Street
Chicago, Illinois 60601

Attention: George Grumley

Defendants

Leave given to plaintiff to proceed in forma pauperis. Leave given to plaintiff to proceed as a class action and as representative of class. Motion of defendant to quash is moot. Subpoena withdrawn. Plaintiffs' motion for a temporary restraining order and preliminary injunction is heard and denied. Motion of plaintiff for injunction pending appeal is denied. Court determines that the action for declaratory judgment and injunction sought by plaintiff must be denied for the reason that the notice for recipients in issue constitutes adequate notice and opportunity to be heard.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
October 22, 1974

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

ELVIRA VARGAS, etc.,

Plaintiff-Appellant,

No. 74-1823

vs.

JAMES TRAINOR,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 74 C 2849

This matter comes before the Court on the appellant's "Motion for Injunction Pending Appeal" and defendant-appellee's motion in opposition to plaintiff-appellant's motion for injunction pending appeal. On consideration whereof,

IT IS HEREBY ORDERED that plaintiff-appellant's motion be GRANTED and that defendant-appellee be enjoined from reducing, terminating, or suspending public assistance grants of plaintiff and the plaintiff class action based on the form notice of such reduction, termination or suspension pending appeal.

IT IS FURTHER ORDERED that appellant's brief be filed on or before November 7, 1974, that appellee's brief be filed on or before November 28, 1974, and that the appellant's reply brief, if any, be filed on or before December 5, 1974.

IT IS HEREBY ORDERED that oral argument will be held on December 11, 1974.

SUPREME COURT OF THE UNITED STATES

No. A-335

JAMES L. TRAINOR, ACTING DIRECTOR,
ILLINOIS DEPARTMENT OF PUBLIC AID,
Applicant

v.

ELVIRA VARGAS, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the injunction entered by the United States Court of Appeals for the Seventh Circuit, case No. 74-1823, entered October 22, 1974, be, and the same is hereby, stayed insofar as it may require petitioner to make payments which would have allegedly fallen due prior to October 22, 1974 pending further consideration of the application when a timely petition for a writ of certiorari is filed and the receipt of a memorandum of respondents.

/s/ William H. Rehnquist
Associate Justice of the
Supreme Court of the United States

Dated this 26th day of October, 1974.

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STATE OF ILLINOIS

Department of Public Aid

NOTICE OF REDUCTION OF ASSISTANCE—
AABD RECIPIENTS

Date of Notice* September 20, 1974

The amount of assistance you receive for October, 1974, will be reduced to the amount shown on the enclosed card. If your assistance is being reduced to "$0" you will still receive your medical card even though you will not get a check.

Your benefits are being reduced because of changes in your needs or living arrangements which occurred between January 1, 1974, and the current month, but which were not entered on your record so as to effect your check. Beginning in October, 1974, when the State will resume control of all supplemental AABD payments, the changes will have been entered and your check will be based upon your updated record. This action is taken pursuant to O.B. 74.46.

This action *will not* be taken if you can show that it is wrong. You may meet with a representative from your local office to question this action. This meeting would be informal and you may present information or evidence. You may be represented by a person(s) of your choice. If you wish such a meeting, contact your case manager. Whether or not you have such a meeting, you will still have the right to appeal the intended action.

YOU HAVE THE RIGHT TO APPEAL THIS DECISION

At any time, *within* 60 days following the "'DATE OF NOTICE'', you have the right to appeal this decision and be given a fair hearing. Such an appeal must be in writing and filed with your county department/district office. You may represent yourself at this hearing or you may be represented by anyone else, such as a lawyer, relative or friend. Your county department/district office will provide you with an appeal form and will help you fill it out if you wish. If you appeal in writing within 10 days of the "'DATE OF NOTICE'', your assistance and/or food stamps will be continued at the present level until a decision is made on your appeal after the hearing.

SUPREME COURT OF THE UNITED STATES

October Term, 1974

JAMES TRAINOR, Acting Director of the State of Illinois Department of Public Aid,

Appellant,

Against

ELVIRA VARGAS, et al.,

Appellees.

A F F I D A V I T

I, JAMES L. TRAINOR, being duly sworn, and on oath, do hereby state:

1. I am the Acting Director of the Illinois Department of Public Aid.

2. The payments for State Supplementation to the AABD Program were mailed to the plaintiff, ELVIRA VARGAS, and to others similarly situated in the reduced amounts indicated on the notices that had been mailed on September 20, 1974. These payments were mailed prior to October 8, 1974.

3. The total of the differences between the September Supplementary Payments and the October Supplementary Payments for the plaintiff ELVIRA VARGAS and all others similarly situated was in excess of $100,000.00, the September total being the higher.

4. That to the best of my knowledge and belief no effective means will exist for recovering funds which the Illinois Department of Public Aid would have to pay pursuant to the injunction granted by the United States Court of Appeals in this matter, were the notice later found to be adequate, the ordered payments therefore having constituted overpayments.

Further affiant sayeth not.

/s/ JAMES L. TRAINOR
JAMES L. TRAINOR

SUBSCRIBED AND SWORN to
before me this 25th day of
October, 1974.

/s/ VERA M. STUHL
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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

FILED
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OCTOBER TERM, 1974

No. 74-511

JAMES TRAINOR, Acting Director, Illinois Department of Public Aid,

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vs.

ELVIRA VARGAS, individually, and on behalf of all others similarly situated,

Respondent.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Great Northern Life Ins. Co. v. *Read*, 322 U.S. 47, 88 L. Ed. 1121, 64 S. Ct. 873 (1944) 6

Harbeck v. *State of Illinois*, 13 Ill. Ct. Cl. 70 (1943) 8

Illinois v. *Sanitary District*, 210 Ill. 171, 71 N.E. 334 (1904) 7

Murray v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909) 4

Palmer v. *Ohio*, 248 U.S. 32, 63 L. Ed. 108, 39 S. Ct. 16 (1918) 6

Parham v. *Cortese*, 407 U.S. 67, 32 L. Ed. 556, 92 S. Ct. 1983, rehearing denied, 409 U.S. 902, 34 L. Ed. 2d 165, 93 S. Ct. 180 (1973) 5

Petty v. *Tennessee - Missouri Bridge Comm.*, 254 F. 2d 857, reversed on other grounds, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785 (1959) 6

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Slezak v. *Ousdigian*, 260 Minn. 303, 110 N.W. 2d 1 (1961) 8

State of Texas v. *Gulf Oil Corp.*, 166 S.W. 2d 197 ... 8

U.S. v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 84 L. Ed. 894, 60 S. Ct. 653 (1940) 6

STATUTES INVOLVED

Ill. Rev. Stats., 1973, Ch. 127, § 801 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-511

JAMES TRAINOR, Acting Director, Illinois Department of Public Aid,

Petitioner,

vs.

ELVIRA VARGAS, individually, and on behalf of all others similarly situated,

Respondent.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Acting Director of the Illinois Department of Public Aid, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 22, 1974 and the opinion filed by that Court on December 27, 1974 in regard to the issue of waiver of sovereign immunity.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Seventh Circuit appears in the Appendix hereto.

ADDITIONAL QUESTION PRESENTED FOR REVIEW

III. Has The State Of Illinois Effectively Waived Its Eleventh Amendment Protection From Suit In This Case?

ADDITIONAL STATEMENT OF THE CASE

On December 27, 1974, the United States Court of Appeals for the Seventh Circuit filed an opinion in this case. The opinion held: (A) that the two notices of reduction of AABD payments sent out by the Department did not meet the requirements of procedural due process. Petitioner withdraws its petition in regard to the issue of adequacy of notice. (B) The Court further held that recovery for the October check was barred as occurring at "a time when petitioner was under no court-imposed obligation to conform to a different standard" citing *Edelman* v. *Jordan*, 415 U.S. at 668, 94 S. Ct. 1347, 39 L. Ed. 2d 66 (1974). (See *Vargas* v. *Trainor* op. p. 11). "Accordingly, an order requiring payment of the October deficiencies in issue here would be retroactive in its application" and, therefore, identical to *Edelman*. "Claims for these deficiencies are therefore barred unless the Eleventh Amendment bar was waived." Petitioner withdraws its petition in regard to the issue of retroactivity of the award. (C) The Court then held that the State had waived its Eleventh Amendment right. It is from the issue of waiver that petitioner brings its petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

A FEDERAL CIRCUIT COURT OF APPEALS IS BARRED FROM INFERRING A WAIVER OF THE STATE'S ELEVENTH AMENDMENT PRIVILEGE BY AN ASSISTANT ATTORNEY GENERAL WHILE ENTERTAINING JURISDICTION OVER A CLAIM FOR RETROACTIVE WELFARE BENEFITS.

A waiver of the State's Eleventh Amendment right must be "stated 'by the most express language or by such overwhelming implications from the text as to leave no room for any other reasonable construction.'" *Edelman* v. *Jordan*, 415 U.S. at 673, 39 L. Ed. 2d 66, 94 S. Ct. 1347 (1974) quoting from *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909); *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 36 L. Ed. 2d 251, 93 S. Ct. 1614 (1973). However, the Seventh Circuit in the case at bar held that the petitioner made a statement to that Court, "through the Attorney General of Illinois, in a memorandum opposing plaintiff's motion for an injunction pending appeal" which "constitutes an unequivocal waiver." (op. p. 11, see Appendix). The statement in the memorandum which the Court refers to is:

> "Plaintiff-Appellant and members of the Class she represents will not be irreparably injured if this Court does not grant an injunction pending appeal. If she is successful on the merits, she will be awarded any benefits wrongfully withheld, presumably while a new notice is sent. . . . However, if an injunction pending appeal is granted and the trial Court's decision is affirmed the State will have no real way of recovering the monies paid out."

The Court held "A representation made in a judicial proceeding for the purpose of inducing the court to act or refrain from acting satisfies the requirements stated in *Edelman*. We therefore hold that defendant has deliberately waived the protection of the Eleventh Amendment." It is respectfully submitted that the statement the Court relies on does not approach the standard for waiver of a constitutional right. Waiver of a constitutional right is not lightly to be inferred as the Seventh Circuit did in this instance. In the civil, no less than the criminal area, Courts must indulge every reasonable presumption against waiver of fundamental constitutional rights. *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983, rehearing denied, 409 U S. 902, 34 L. Ed. 2d 165, 93 S. Ct. 177 (1972); *Emspak* v. *U.S.*, 349 U.S. 190, 99 L. Ed. 997, 75 S. Ct. 687 (1955). For waiver to be effective it must be clearly established that there was a voluntary, intentional relinquishment or abandonment of the constitutional right. *Brookhart* v. *Janis*, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct 1245 (1966). The foundation of the appeal to the Seventh Circuit in this case rested upon the advocacy by the State of its sovereign immunity. The State never intended to abandon this right as the Court infers. Indeed, petitioner vigorously denies having made such a waiver. The language relied upon must, *on its face*, amount to a waiver, *Fuentes* v. *Shevin (supra); Parham* v. *Cortese*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983, rehearing denied 409 U.S. 902, 34 L. Ed. 2d 165, 93 S. Ct. 180 (1973), and there is no express language amounting to waiver in the statement relied upon by the Court, Constructive consent clearly is not a doctrine commonly associated with the surrender of constitutional rights.

Valid consent alone can give the Court jurisdiction to adjudge against a sovereign, and, in the absence of that consent, the attempted exercise of judicial power is void. *U.S.* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 84 L. Ed. 894, 60 S. Ct. 653 (1940). Even if the doctrine of "constructive consent" is invoked, the State may withdraw its consent "whenever it may suppose that justice to the public requires it." *Beers etc.* v. *State of Arkansas*, 61 U.S. 527, 20 How. 527, 15 L. Ed. 991 (1857); *Ford Motor Co.* v. *Dept. of Treasury of State of Indiana*, 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347 (1945). The sovereign may prescribe the terms and conditions on which it consents to be sued and the manner in which the suit shall be conducted. Thus, even if the statement made by the Assistant Attorney General were to be construed as consent, the State may withdraw the consent by invoking its privilege of sovereign immunity.

Furthermore, the Illinois Assistant Attorney General who appeared on behalf of the Illinois Department of Public Aid in the trial court was without legal power or authority to waive the right of the State to immunity from suit. The statutory powers of the attorney general to appear and defend actions against the State do not give him the power to consent to a suit against the State in Courts when the State has not consented to be sued. *Ford Motor Co.* v. *Dept. of Treasury of Indiana (supra); Palmer* v. *Ohio*, 248 U.S. 32, 63 L. Ed. 108, 39 S. Ct. 16 (1918). See Ill. Rev. Stats., 1973, Ch. 127 § 801 which states ". . . the State of Illinois shall not be made a Defendant or party in any Court." The State's immunity from suit is a privilege which may be waived only by the proper authority. *Great Northern life Ins. Co.* v. *Read*, 322 U.S. 47, 88 L. Ed. 1121, 64 S. Ct 873 (1944); *Petty* v. *Tennessee-Mis-*

souri Bridge Comm., 254 F. 2d 857, reversed on other grounds, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785 (1959). Consent by an officer who has no authority to waive the immunity of the State is ineffectual. *Georgia R.R. & Banking Co.* v. *Redwine*, D.C. Ga., 85 F. Supp. 749, reversed on other grounds, 72 S. Ct. 321, 342 U.S. 299, 96 L. Ed. 335 (1952).

The Illinois Attorney General as a matter of law could not waive the Eleventh Amendment defense, *Ford Motor Company* v. *Treasury Department of the State of Indiana*, 323 U.S. 459, 467 (1944). The law is clear in Illinois that an Assistant Attorney General cannot waive the body politic's defense of Sovereign Immunity as it may be incorporated into the Eleventh Amendment prohibition. In *Illinois* v. *Sanitary District*, 210 Ill. 171, 173, 71 N.E. 334, 335 (1904) it was said:

> ". . . the Attorney General cannot, as we think, waive the State's immunity from being placed in the position of a defendant. Nor can he commit or bind the state by filing a cross-petition, the result of which is to place the State in the attitude of a defendant in the proceeding. *Ex Parte Dunn*, 8 S.C. 207; *Dabney* v. *Bank*, 3 Id. 124; *Adams* v. *Bradley*, 5 Sawyer 217; 26 Am. and English Ency. of Law, (2d Ed.) 486.
>
> The authorities seem agreed that where the constitutional exemption can be waived the authority to do so rests with the Legislature. (Citations omitted) We are not called upon to determine whether the legislature under our Constitution could waive the exemption or authorize a suit or proceeding to be brought against the State, as it has not attempted to do so in the case before us."

Likewise see *Powers* v. *Tealeander*, 129 Ill. App. 2d 10, 262 N.E. 2d 342 (1970). The State of Illinois cannot be bound by statements or acts of the Attorney General,

or any of his assistants, which they do not have the right, power, or authority to make. *Harbeck* v. *State of Illinois*, 13 Ill. Ct. Cl. 70 (1943). Other cases which hold that the immunity of a sovereign may not be waived by its attorneys or Attorney General are:

Darnall v. *State*, 79 S.D. 59, 108 N.W. 2d 201, 203 (1961) citing *Arkansas State Highway Comm.* v. *McNeil*, 222 Ark. 643, 262 S.W. 2d 129 and *Dunn* v. *Schmid*, 239 Minn. 559, 60 N.W. 2d 14.

Slezak v. *Ousdigian*, 260 Minn. 303, 110 N.W. 2d 1, 5 (1961).

Charles E. Brohawn & Bros., Inc. v. *Board of Trustees*, 269 Md. 164, 304 A. 2d 819, 820 (1973).

Department of Public Safety v. *Great S.W. Warehouses*, 352 S.W. 2d 493, 494 (1961).

State of Texas v. *Gulf Oil Corp.*, 166 S.W. 2d 197.

It is thus clear that the Circuit Court was barred from inferring a waiver of the State's Eleventh Amendment privilege from a statement made by the Assistant Attorney General.

CONCLUSION

For the reasons stated herein, it is respectfully requested that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 22, 1974, and the opinion filed by that Court on December 27, 1974, in regard to the issue of waiver of sovereign immunity.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 74-1823 and 74-1968

ELVIRA VARGAS, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

JAMES TRAINOR, Acting Director, Illinois Department of Public Aid,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division —
Nos. 74 C 2849 and 74 C 3441
Frank J. McGarr, *Judge.*

Argued December 11, 1974 — Decided December 27, 1974

Before FAIRCHILD, SPRECHER and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* The procedure by which the Illinois Department of Public Aid reduced or terminated certain public assistance to aged, blind, and disabled recipients is challenged under the Due Process Clause of the Fourteenth Amendment. We hold that the procedure

did not conform to constitutional standards and reverse the District Court's contrary judgment.

Until the end of the year 1973, needy, blind, and disabled persons in Illinois received cash assistance from the Illinois Department of Public Aid. The Federal Government provided 50 percent of the funds for these payments through the program of Aid to the Aged, Blind and Disabled (AABD) established pursuant to Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1385 (1969 ed.). To arrive at the total amount of a recipient's grant, the Department determined how much he needed for each of a number of individual items of allowance, *e.g.*, for food, clothing, rent, and furniture. The amounts of grants varied among recipients, depending on their needs as determined by the Department.

Effective January 1974, amendments to Title XVI of the Social Security Act established a new program, called Supplemental Security Income (SSI), which partly replaced the AABD program. Public Law 93-66, 93d Cong., 1st Sess. (1973), 42 U.S.C. § 1381 *et seq.* (Supp. 1973). The new law provided for a uniform federal minimum assistance grant, currently $146 per month for each recipient, which is entirely federally funded and is administered by the Social Security Administration of the Department of Health, Education and Welfare.

To assure that payments to former AABD recipients would not be reduced, the new law required the state, as a condition of participation in the federal-state Medicaid Program (Title XIX of the Social Security Act), to supplement the monthly SSI payments to persons who were receiving assistance as of December 1973 in order to keep payments to those persons at their then level so long as

their needs for assistance did not change. This "mandatory state supplement" is funded by the state. *Id.* § 212. Under the new, combined program, an AABD recipient who was receiving, for example, $200 per month would continue to receive that amount so long as his need for assistance did not change. He would receive $146 in SSI benefits and $54 as the mandatory state supplement. If, however, his December 1973 payment included an amount for "a special need . . . or any special circumstance," and "a change with respect to such special need or circumstance" thereafter occurred, the mandatory state supplement would be reduced to reflect the reduction in need. *Id.* § 212(a)(3)(d).

The state may administer and pay the mandatory supplement itself or elect to have the Social Securnty Administration do so. *Id.* § 212(b)(1). At first the Illinois Department made this election, and from January until September 1974, the Social Security Administration's payment to each Illinois recipient included both the $146 SSI grant and the mandatory supplement. In September 1974 the Illinois Department took over the administration and payment of the supplement, beginning with the October 1974 payment. This meant that each recipient would receive the $146 SSI grant from the Social Security Administration and the mandatory supplement from the Illinois Department of Public Aid.

To some 3,780 aged, blind and disabled recipients, approximately 10 percent of the total, the Department sent a written notice in late September advising each of them as follows:

> "The amount of assistance you receive for October, 1974, will be reduced to the amount shown on the enclosed card."

The reduction was said to be "because of changes in your needs or living arrangements which occurred between January 1, 1974, and the current month, but which were not entered on your record so as to effect your check." No other explanation or statement of reasons was given. The "enclosed card" referred to in the notice was a computer printout which simply stated, "The amount of your grant for October, 1974 will be" a stated amount and contained a code designation and the name and address of recipient.

The notice also stated that the reduction would not be made "if you can show that it is wrong." The recipient was advised, "You may meet with a representative from your local office to question this action," at an informal meeting where "you may present information or evidence," and "be represented by a person(s) of your choice"; that if he wanted such a meeting he should contact his case manager; and that whether or not he had such a meeting he had a right of appeal.

In addition, the notice advised the recipient that he had a right to appeal in writing within 60 days of the date of the notice and thereby obtain a fair hearing. The Department's local office would provide him with an appeal form and stood ready to help fill it out. If an appeal was filed within 10 days of the date of the notice, the assistance payments would not be reduced until a decision on the appeal after the hearing.

Plaintiff Elvira Vargas was one of the AABD recipients to whom the notice of reduction of assistance was sent. Upon receiving it, she filed this action on behalf of herself and other members of the class composed of all aged, blind, and disabled recipients of mandatory supple-

ments whose benefits would be reduced in October 1974 pursuant to the form notice described above. Naming the Director of the Illinois Department of Public Aid as the defendant, her complaint alleges in substance the foregoing facts, attacks the notice as inadequate and untimely, and asserts the right of each member of the class to a fair hearing prior to the time the reduction or termination of his benefits goes into effect. Plaintiff moved for interlocutory injunctive relief.

The District Court held a hearing on the motion on October 4, two days after the complaint was filed. The court certified the action as a class action, denied interlocutory relief, and denied an injunction pending appeal. Upon agreement by the parties that further proceedings would be unnecessary, the court found the notice and opportunity to be heard adequate and entered a final judgment for defendant.

On October 22 this court, on motion of plaintiff, entered an order enjoining defendant, pending appeal, from reducing or terminating grants based on the notice described above. In the order the court also established an expedited briefing schedule and set an early date for oral argument.

In late November, about three weeks before the date set for argument in this court, the Department of Public Aid sent out to the members of the plaintiff class a new "Notice of Reduction (AABD)." This notice advised the recipient that the amount of the grant he would receive in December would be less than the amount received from the Department in November. In other respects the notice was the same as the September notice. The "enclosed card," however, unlike the card accompanying the September notice, which showed only the total amount of the

monthly state grant, contained a breakdown showing the amount allowed for each item, such as clothing, household supplies, rent, etc. The SSI grant of $146 was then shown as deducted from the total, and the balance was shown as the state income maintenance payment. Again neither the notice nor the enclosed card stated why the grant was being reduced.[1]

One member of the class, Robert Collier, appealed after receiving the first notice, and, after a hearing, the Department restored his grant to the September level. One week after receiving notice of that action, however, he received his copy of the November notice and its enclosed card, which informed him that his grant had again been reduced to the October level specified in the previous notice. Defendant stated in oral argument that apparently a mistake was made with respect to Collier.

After receiving the November notice, plaintiff filed a new complaint in the District Court attacking that notice. The case was assigned to the same judge who had decided the first case. He denied injunctive relief and entered judgment for defendant. Again this court granted an injunction pending appeal. The two cases were consolidated and argued together.

Due Process

The Supreme Court held in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) that a state could not, consistently with the requirements of procedural due process, terminate welfare benefits without first providing the recipient with a

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1. Unless the recipients know the components of their former grants, and apparently most do not, they do not even know what changes were made in the components.

hearing. The New York procedure challenged in that case included a pre-termination notice stating the reasons for termination, and the adequacy of the notice was therefore not in issue. Nevertheless, the Court addressed itself to that subject, among others, in the following passage:

> "'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." 397 U.S. at 267-268.

Although the statement that the notice must be an "adequate notice detailing the reasons" may be considered dictum, we are hardly at liberty to ignore it. There is, moreover, other authority to the same effect. This court, in *Brooks* v. *Center Township*, 485 F. 2d 383, 385 (7th Cir. 1973), held the Indiana "poor relief" statute invalid, stating:

> "We hold that the statute is constitutionally infirm facially for want of due process in failing to provide, inter alia, a pre-termination hearing, an effective opportunity for Brooks to defend, and want of due notice of reasons for termination. *Goldberg* v. *Kelly*, 397 U.S. 254, 264-268, 90 S. Ct. 1011, 25 L. Ed. 287 (1970)."

Similarly, the Second Circuit found a denial of due process in a state agency's procedures for terminating the leases of public-housing tenants for "non-desirable conduct" in *Escalera* v. *New York City Housing Authority*, 425 F. 2d 853, 862-863 (2d Cir. 1970), because, *inter alia*,

the notices did not advise the tenants of the reasons for the termination. Three-judge courts have held that failure of state authorities to inform a public assistance recipient of the reason for reducing or terminating his benefits before taking that action is a denial of due process. *Pregent* v. *New Hampshire Department of Employment Security*, 361 F. Supp. 782, 795-797 (D.N.H. 1973), *vacated and remanded on other grounds*, 417 U S. 903 (1974); *Sims* v. *Juras*, 313 F. Supp. 1212, 1215 (D. Ore. 1969); see *Caldwell* v. *Laupheimer*, 311 F. Supp. 853, 856 (E.D. Pa. 1969). It has also been held that a tenant in publicly-subsidized housing who has a statutory right not to be terminated except for good cause has a right to pre-termination notice stating the reasons for the proposed action. *McQueen* v. *Druker*, 317 F. Supp. 1122, 1128-1131 (D. Mass. 1970) (Wyzanski, J.), *aff'd*, 438 F. 2d 781 (1st Cir. 1970). A student faced with expulsion is also entitled to a notice containing a statement of reasons. *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150, 151-152, 158 (5th Cir. 1961). All these cases recognize that the notice of proposed action cannot be adequate if it does not include the reasons or grounds for the action.

Defendant argues that due process was satisfied in the case at bar because the notice advised the recipient that he could learn the reason for the proposed reduction or termination of benefits by inquiring of his caseworker. Such a notice does not, however, meet the requirement laid down in the foregoing authorities that before public assistance benefits can be reduced or terminated the recipient be given a notice stating the reasons for the proposed actions. See especially *Escalera* v. *New York City Housing Authority*, *supra*, 425 F. 2d at 862.

Even if the cases were not read to impose so categorical a requirement, the notice in this case would fail to meet the requirements of due process. The notice is addressed to persons who are aged, blind, or disabled, many of whom, defendant could have anticipated, would be unable or disinclined, because of physical handicaps and, in the case of the aged, mental handicaps as well, to take the necessary affirmative action. Within what was left of the ten days after they received the notice, they were required either to manage to meet with their caseworkers and learn the reasons for the proposed action and then decide whether to appeal, or to appeal without knowing whether an appeal might have merit. If they failed to do either, their benefits were reduced or terminated without their being advised why. Under such a procedure only the aggressive receive their due process right to be advised of the reasons for the proposed action. The meek and submissive remain in the dark and suffer their benefits to be reduced or terminated without knowing why the Department is taking that action.

Defendant impliedly recognizes the likelihood that few members of the class would seek out their caseworkers when he argues that including the reasons for the proposed action in the notice would have been unreasonably burdensome to the personnel of the Department. If most of the 3,780 members of the class had sought out their caseworkers to obtain information needed to make an intelligent decision as to whether they should elect to appeal, the burden and disruptive effect on the Department would have been intolerable. By comparison, furnishing the information in writing in an orderly way would have been a mild inconvenience. Obviously, defendant chose

the summary form of notice because he expected most members of the class not to seek explanations and therefore not to be informed of the reasons for the proposed action before that action was taken.

The Collier case demonstrates "the possibility for honest error or irritable misjudgment" (*Goldberg* v. *Kelly*, *supra*, 397 U.S. at 266, quoting from the opinion of the three-judge court in that case) that underscores the need for procedural due process in the reduction or termination of welfare benefits. There the Department not only made the initial errors that were corrected after hearing an appeal, but then promptly made the same errors all over again and thus undid what had been accomplished by Collier's appeal. Government agencies do make mistakes. Yet there is a human tendency, even among those who are more experienced and knowledgeable in the ways of bureaucracies than the aged, blind, and disabled persons before us in this case, to assume that an action taken by a government agency in a pecuniary transaction is correct. Unless the welfare recipients are told why their benefits are being reduced or terminated, many of the mistakes that will inevitably be made will stand uncorrected, and many recipients will be unjustly deprived of the means to obtain the necessities of life.

The reduction or termination of benefits to the members of the plaintiff class pursuant to the September notice was unlawful, because the notice did not state the reasons for the proposed action. The November notice was equally deficient, for it merely showed the amounts of the components of the recipient's grant, as reduced by the proposed action, and did not state the reasons for that action. The members of the plaintiff class are therefore entitled

to receive their state mandatory supplements unreduced by the adjustments reflected in the two notices, until all the requirements of due process are met.

We are not unmindful of the state's interest in making welfare payments only to those who are eligible to receive them and only in the proper amounts. The state has every right to terminate or reduce benefits when warranted in a recipient's situation or discovery of an error of fact. We hold only that in making these adjustments the state must observe the requirements of due process.

Retroactivity

By the time this court entered its October 22 order granting an injunction pending appeal, defendant had already made the reduced October supplementary payments to the members of the plaintiff class. Interpreting our order as "apparently" requiring him to restore to class members the amounts of the October reductions, defendant sought a stay from Justice William H. Rehnquist as Circuit Justice, arguing that the Eleventh Amendment, as interpreted in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), made our order invalid insofar as it required such restoration. Justice Rehnquist entered a temporary partial stay and requested a response, after receipt of which he vacated his prior order and denied the stay, stating as his reasons for doing so our acceleration of the appeal and the following:

> "I do not believe that the interpretation of the Court of Appeals' injunction urged by petitioner-applicant [defendant]—that he is required by it to make retroactive payments to respondent and her class—is necessarily the interpretation which the Court of Appeals would place on its injunctive order."

Defendant then moved here for a clarification of the injunction order. That motion was taken with the case.

Edelman v. *Jordan* involved claims for AABD payments for the period between the effective date of the federal regulations that were ultimately held to have been violated by the failure to make the payments and the date of the preliminary injunction. This court held that the Eleventh Amendment did not bar an order requiring the payments to be made. *Jordan* v. *Weaver*, 472 F. 2d 985 (7th Cir. 1973). The Supreme Court reversed, holding that the Eleventh Amendment barred relief. *Edelman* v. *Jordan*, *supra*, 415 U.S. 651.

Edelman holds that the Eleventh Amendment permits only prospective relief and bars a judgment for past liability that must be satisfied from the general revenues of the state. Plaintiff argues that the event dividing the past from the prospective is the beginning of the pay period during which the injunctive order was entered or, alternatively, the date of filing suit. We read *Edelman* to require rejection of both alternatives. There the District Court, in a judgment affirmed by this court, had ordered payments of amounts wrongfully withheld before the entry of the preliminary injunction. The Supreme Court reversed and in so doing necessarily held that payments that should have been made prior to the time of the preliminary injunction but after the complaint was filed[2] were subject to the Eleventh Amendment. Also, in its analysis of the impact of the Eleventh Amendment in the light of

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2. The complaint was filed January 12, 1971 under the title *Jordan* v. *Swank*, No. 71 C 70, N.D. Ill. The preliminary injunction was entered April 16, 1971.

Ex Parte Young, 209 U.S. 123 (1908) and other cases, the court speaks of the period for which recovery was held barred as "a time when petitioner was under no court-imposed obligation to conform to a different standard." (415 U.S. at 668.) We conclude that the entry of a court order or judgment requiring that payments be made divides the past from the prospective for Eleventh Amendment purposes. Accordingly, an order requiring payment of the October deficiencies in issue here would be retroactive in its application.

The October deficiencies are in all material respects comparable to those which were held to be subject to the Eleventh Amendment in *Edelman*. They are accrued monetary liabilities that would have to be paid from the general revenues of the state. They should have been paid but were not at a time when the defendant was not under a court-imposed obligation to pay them. They are reparations, measured in terms of monetary loss, for breach of a past legal duty. 415 U.S. at 664-665, 668. Claims for these deficiencies are therefore barred unless the Eleventh Amendment bar was waived.

Plaintiff argues that there was a waiver. A waiver of the state's Eleventh Amendment right must be "stated 'by the more express language or by such overwhelming implications from the text as to leave no room for any other reasonable construction.'" (*Edelman* v. *Jordan*, *supra*, 415 U.S. at 673, quoting from *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).)

The issue to be decided is whether a statement defendant made to this court, through the Attorney General of Illinois, in a memorandum opposing plaintiff's motion for an injunction pending appeal constitutes an unequivocal waiver. In that memorandum defendant stated:

> "Plaintiff-Appellant and members of the Class she represents will not be irreparably injured if this Court does not grant an injunction pending appeal. If she is successful on the merits, she will be awarded any benefits wrongfully withheld, presumably while a new notice is sent. . . . However, if an injunction pending appeal is granted and the trial Court's decision is affirmed the State will have no real way of recovering the monies paid out."

There can be no doubt that the words "successful on the merits" meant successful on the merits in this court, not in an administrative appeal challenging the propriety of the reduction. And "wrongfully withheld" clearly meant wrongfully withheld by reason of denial of due process as determined by this court, not wrongfully withheld because the reason for the reduction proved to be wrong. If the latter were intended, there would have been no occasion to refer to the sending of a "new notice." Success for plaintiff on the merits would be a holding that the procedure employed in reducing the payments was deficient, which would mean that benefits in the amount of the reductions were wrongfully withheld because they were withheld without due process. These would be paid, "presumably while a new notice is sent." Our interpretation is confirmed by defendant's statement in making the same point in his motion for stay presented to Justice

Rehnquist: ". . . if Respondents succeed in the Appellate Court, the Department will return any monies withheld and maintain their assistance at the higher level."[3]

Thus defendant, in an effort to persuade this court not to enter an injunction against him, represented that if the plaintiff class was ultimately successful in its claim of denial of procedural due process, he would make the deficiency payments that had been withheld, and therefore the plaintiff class would not be prejudiced by denial of the injunction. There was no claim at that time that the Eleventh Amendment would bar recovery of such payments, or any part of them. If we had not issued the injunction, defendant could hardly, upon our rendering judgment against him in December, have repudiated his representation and invoked the Eleventh Amendment to bar recovery of the October, November and December deficiencies.

This court's issuance of the injunction despite the representation does not change, or release defendant from honoring, the representation. The court's action was not based on a belief that the representation could not be relied upon but on the hardship that would be visited on the welfare recipients if their benefits were reduced or eliminated while the appeal was pending, even assuming they would be restored later. A representation made in a

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3. At the same time defendant somewhat inconsistently argued in his motion for stay that our injunction order violated the Eleventh Amendment. As stated in the text, there had been no mention of the Eleventh Amendment point in the memorandum filed with us in opposition to an injunction pending appeal.

judicial proceeding for the purpose of inducing the court to act or refrain from acting satisfies the requirements stated in *Edelman*. We therefore hold that defendant has deliberately waived the protection of the Eleventh Amendment.

The judgment of the District Court is reversed and the cause is remanded with directions to enter a judgment in conformity with this opinion. Upon the entry of such a judgment our injunctive order of October 22, 1974 will be vacated.

REVERSED AND REMANDED WITH DIRECTIONS.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit